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NO. 84-233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,
V.
IRL SHUTTS, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Kansas

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

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INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") has previously appeared in this cause to argue in support of the Petition for Certiorari. It now appears to present its arguments on the merits.

LFA is a nonprofit corporation supporting the operations of a tax exempt public interest law firm.* It is located on the campus of the South Texas Law School in Houston, and it shares certain personnel and activities with the law school. LFA's goals include the reasonable construction of regulation and the preservation of the values of federalism. In support of these goals, LFA has appeared as amicus curiae in this honorable Supreme Court,** in the federal courts of appeals, in the federal district

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* "Public interest law firm" is a designation made by the Internal Revenue Service pursuant to its regulations.

** In some instances, LFA has appeared in its own name, as here. In others, its attorneys have appeared as representatives of such diverse

courts, and in the courts of the several States.

The case at bar presents substantial questions of due process and interstate federalism. The Kansas Supreme Court correctly treated the class action in this case as a regulatory device.[1] But what the Kansas court did not acknowledge is that different jurisdictions may wish to take different approaches to both class actions and regulatory schemes and may attempt to diminish harmful and costly effects attributable to regulation itself.[2]

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clients as professional or trade associations, associations of state government officers, individuals, States, and political subdivisions.

1 For example, the Kansas court mentioned Kansas' interest in regulating the conduct of oil and gas producers within the territorial confines of Kansas. Appendix A28. In fact, class actions are just as effectively a type of regulatory control over the conduct of business as regulation by a consumer protection agency or oil and gas board.

There may be even greater concern, however, for the abuses of regulation by class action than for abuses of other kinds of regulation. Any attorney, whether responsive to state policy or not, has the ability to bring a class action entailing enormous litigation costs without regulatory supervision over the decision to cause those costs. See note 19 infra.

2 Scholarly theories are diverse and inconsistent, and there is a substantial literature on the subject. See, e.g., Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 HARV. L. REV. 718 (1979); Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, 25 HASTINGS L.J. 1411 (1974); Comment, State Court Jurisdiction over Multistate Plaintiff Class Actions: Minimum Contacts and Miner v. Gillette, 69 IOWA L. REV. 795 (1984); Note, Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions, 56 TEXAS L. REV. 1033 (1978). Numerous other articles and notes are cited in these works.

In Illinois, some commentary has been harshly critical of Miner v. Gillette Co., 87 Ill.2d 7, 428 N.E.2d 478 (1981). See Note, Illinois Multistate Plaintiff Class Actions: Abrogation of Jurisdictional Limitations on State Sovereignty, 31 DEPAUL L. REV. 471, 496 (1982) (". . . the Miner opinion invites an onslaught of trivial suits to be filed in Illinois, suits that the state will have little reason to consider"), cf. Note, 71 ILL. B.J. 184 (1982). One article favorable to the decision was written by a member of the firm that served as plaintiff's class counsel. Ross, Multistate Consumer Class Actions in Illinois, 57 CHI-KENT L. REV. 397 (1981).

SUMMARY OF ARGUMENT

I.

A. Interstate Federalism as a Concern Underlying Jurisdictional Requirements. This Court has repeatedly pointed out that one reason for having jurisdictional requirements is to protect interstate federalism. Many States have determined that class actions themselves cause enormous regulatory costs and have used personal jurisdiction as a means of restricting them accordingly. Kansas has here countermanded those States' decisions in derogation of the federal system and has imposed regulatory costs upon citizens elsewhere that they might not have chosen to incur.

B. Rights of Class Action Defendants. If Kansas' decision stands, the legitimate interests of defendants in finality of judgments can only be resolved by the complex and draconian invention of a federal body of law mandating res judicata in the absence of personal jurisdiction. Such a step would not only conflict with established principles but would create formidable practical difficulties.

C. Interests of Class Members. Plaintiffs have sometimes opposed class certification. They are in a position similar to that of defendants in that they face potentially binding adverse adjudication. In fact, the Kansas court's reasoning would support with equal force the abolition of jurisdictional requirements for classes composed of defendants.

II.

"Magnet" Forums and Frustration of Other States' Regula-

tory Policies because of Kansas' Choice-of-Law Approach. The Kansas court's approach to choice of law would encourage claimants' attorneys to seek the one "best" forum in every multistate class action. This "magnet" forum would be the one among the fifty states that would be most certain to hold against the defendant and award maximum damages, ignoring all other States' laws. The frustration of other States' regulatory policies would follow naturally.

III.

Kansas' Erroneous "Common Fund" Reasoning. This case does not even remotely resemble the "common fund" cases. The Kansas court's reasoning in this regard would support the abolition of choice-of-law and jurisdictional requirements in every multistate class action.

ARGUMENT

I. THE MAINTENANCE OF MULTISTATE CLASS ACTIONS IN THE ABSENCE OF PERSONAL JURISDICTION ADVERSELY AFFECTS THE REGULATORY POLICIES OF STATES IN A FEDERAL SYSTEM, AS WELL AS THE INTERESTS OF CLASS PLAINTIFFS AND DEFENDANTS.

A. The assertion by Kansas of jurisdiction here is inconsistent with interstate federalism and imposes costs on other States that they might not choose for themselves.

Amicus acknowledges that, in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee,* [3] this Court subordinated the interstate federalism aspect of personal jurisdiction to the individual liberty interests of parties. However, in *World-*

3 456 U.S. 694, 702-03 n. 10 (1982).

Wide Volkswagen Corporation v. Woodson, [4] the Court had, shortly earlier, said the following:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigation in a distant or inconvenient forum. *And it acts to ensure that the States, through the courts, do not reach out beyond the limits imposed upon them by their status as coequal sovereigns in a federal system.*

The Kansas court's decision is in derogation of this principle, which is expressed in statements tracing back to this Court's opinion in *International Shoe Company v. Washington.* [5]

An example of the conflict in State policies regarding class actions may be found in *Miner v. Gillette Company,* [6] in which this Court granted certiorari but later dismissed for lack of finality. Gillette gave away hundreds of thousands of free items in a promotional effort but underestimated demand. It offered a refund and substitute to the remainder of applicants. The class complaint charged that this ostensibly innocent conduct constituted a deceptive concealment by Gillette of the fact that it did not have sufficient merchandise to give to all who asked.

There are two ways to regard such a claim, either of which might be subscribed to by a conscientious state government. The Supreme Court of Illinois regarded the class action in question as

4 444 U.S. 286, 291-92 (1980) (emphasis added). The Court concluded that the jurisdictional limit of due process was "an instrument of interstate federalism" protecting the "orderly administration of the laws" of other States. Id. at 294, quoting International Shoe v. Washington, 326 U.S. 310, 317 (1945).

5 See note 4 supra.

6 87 Ill.2d 7, 428 N.E.2d 478 (1981).

a valuable regulatory protection for consumers. Another reasonable view, however, is that the action in *Miner v. Gillette Company* represented a kind of regulation that could raise costs for all consumers (both in Illinois and in every other State) disproportionately to its putative benefits. A State other than Illinois might conclude that the labelling of apparently innocuous conduct as deceptive[7] reduces the availability of goods and services,[8] because producers must protect themselves from unpredictable liability. The ease of blackmail,[9] disproportionate enrichment of class counsel, and inevitable frustration of state policy that results from even conscientious efforts to adjudicate fifty sets of complex state laws,[10] might be further concerns to such a State. Particularly when, as in *Gillette*, there was no monetary loss to any consumer, and potential recoveries were only a few dollars, a thoughtful state citizenry might choose to avoid encouraging multistate class actions such as those certified by Kansas and Illinois, as a means of protecting itself from the costs and disadvantages of such actions.

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7 A State might also conclude that the labelling of apparently honest conduct as deceptive trivializes the law and results in oppression. Cf. Comment, supra note 2, 69 IOWA L. REV. at 810.

8 Cf. R. POSNER, ECONOMIC ANALYSIS OF LAW ch. 6 (2d ed. 1977).

9 Id. at 474. A class action "places the lawyer in [a position that] relieves him of accountability, which is bad, because his private goal diverges from the social goal of obtaining a judgment equal to the social costs of the violation." Id. at 450.

10 It is unlikely, for example, that a local state court will have ready access to statutory and decisional law of all fifty states. It is equally unlikely that all counsel will. The removal of decisional law from its procedural context and the complexity of the kinds of consumer and energy laws at issue make appropriate understanding of all fifty jurisdictions' laws unlikely, not to mention the possibility of the forum's disregard of those laws, as in the present case. See Note, 92 HARVARD L. REV., supra note 2, at 734; Comment, 69 IOWA L. REV., supra note 2, at 804 (concluding that "the usual risks involved in interpreting unfamiliar laws increase exponentially in a nationwide class action").

Indeed, it is arguable that the majority of States have already made this choice by declining to adopt proposed legislation that would sanction multistate class actions on a reciprocal basis. The Uniform Class Actions Act[11] provides two means by which a court can obtain jurisdiction over a class of multistate plaintiffs: (1) by the presence of minimum contacts or (2) by a reciprocal recognition of the binding effect (i.e., by a State's consenting to have its citizens bound by class actions elsewhere). The Uniform Act respects interstate federalism concerns, and it is notable that it would require minimum contacts here. Texas, Oklahoma, and the majority of States have declined to adopt the reciprocal provisions of the Act.[12] Even upon full consideration, they might decide not[13] to adopt them, if they concluded that their citizens' interests would be better served by a narrower class action approach entailing lower regulatory costs and fewer disadvantages. Kansas and Illinois have countermanded this choice.

B. Unless this honorable Supreme Court were to undertake the draconian step of forcing all fifty state

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11 UNIFORM CLASS ACTIONS ACT sec. 6 provides:

(a) A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

(1) a basis for jurisdiction exists or would exist in a suit against the person under the law of this State [or]

(2) the state of residence of the class member, by class action law similar to subsection (b), has made its residents subject to the jurisdiction of the courts of this State.

(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this State.

12 Only North Dakota has adopted the reciprocal feature of the Uniform Act. See N.D. R. CIV. P. 23(f).

13 Cf. Scher, Uniform Class Actions: A Critical View, 63 A.B.A.J. 840 (1977). Oklahoma has continued to require opt-in and has thus expressed its preference to confine class litigation more narrowly. Okla. Stat. Ann. Tit. 12, sec. 14.

courts to give res judicata effect in the absence of personal jurisdiction, defendants could not be sure of fair, binding judgments and would be discouraged from settling multistate class actions.

The fifty states supreme courts are not bound to give *res judicata* effect to judgments rendered by courts without personal jurisdiction. Understandably, many do not give such effect in class actions lacking personal jurisdiction.[14] Defendants therefore cannot know whether the judgments that end multistate class actions will be given binding effect, and indeed they can be certain that it is the carefully considered policy of many States not to do so.

This lack of binding effect of class actions without personal jurisdiction is especially disadvantageous in the event that a defendant wishes to accept a settlement overture. The vast majority of class actions settle. Settlement is strongly favored because class actions are uncertain and enormously costly. However, the defendant is particularly likely to be subjected to a "heads I win, tails you lose" approach in multistate class actions. If the defendant happens to prevail at trial, or if the defendant settles for an amount that plaintiffs elsewhere think is inadequate, there is every reason to expect that nonresident class "members" over whom the court had no jurisdiction will relitigate in their home forums [15] and will be sympathetically received.

14 For example, Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12 (1976), and Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976), conflict with Shutts and Miner. See Petition for Certiorari at 9-11.

15 The Kansas Court did not consider the viability of multiple overlapping national class actions, in which two or more States attempt to adjudicate the same claimants' rights. See, e.g., in re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) (involving overlapping class certifications). The decision below enhances the likelihood of such conflicts without providing guidance as to their resolution.

This discouragement of settlement is one of the least attractive features of the Kansas court's decision.[16]

The important point is that this honorable Supreme Court cannot solve these difficulties by a simple decree. It can do so only by the draconian step of creating and supervising a universal federal body of law governing *res judicata* and by requiring the fifty state supreme courts to extend binding effect in the absence of personal jurisdiction.[17] Such a step would be both inconsistent with federalism and impractical.

This court has already rejected such a pervasive, general law of *res judicata* in the class action context. In *Donovan v. City of Dallas,* 377 U.S. 408 (1964), a state court attempted to enjoin relitigation in federal court of a state-court class action in which defendant had prevailed. As this Court held, "whether or not a plea of *res judicata* in the second suit would be good is a question for the [second] court to decide." [18] Presumably, this

16 In fact, Amoco Producing Company actually made an effort here to settle possible obligations by making payments of interest in amounts it determined were lawful in each respective State. It was nevertheless subjected to a Kansas class action parallel to that against Phillips, seeking more interest. Dudley v. Amoco Production Co., No. 80-C-34 (Dist. Ct. Stevens Cy., Kan., pending). The possibility that a good faith settling defendant may be subjected to such treatment is very real, and the lack of assurance to the contrary may cause a defendant to regard as unwise a settlement offer that it would otherwise accept.

17 Such a principle has never been thought to be a consequence of the full faith and credit clause, which requires that the first judgment be within the first court's jurisdiction. An extension of the clause would conflict with prior decisions to that effect and would create the theoretical and practical difficulties discussed here.

18 Literally, the Court stated that the question was one for the "federal" court (which was the second court) to decide, and it emphasized the statutory jurisdiction of federal courts. Since every state provides similarly by statute for its courts' jurisdiction, the principle applies to both state and federal courts.

deference to coequal sovereignties would extend to other, coequal state courts, which should have authority to determine the preclusive effect of a judgment rendered without jurisdiction just as they would other issues in the suits before them.

Furthermore, the practical difficulties of supervising a general federal requirement of res judicata in class actions without personal jurisdiction would be formidable. One commentator has described them thus:

> Among the hypothetical parade of horribles which can be projected is *the scenario in which 50 competing, national, multistate opt-out class actions are brought on the same claims and all members remain silent in response to the fifty notices. . . .* [T]his dilemma of interstate federalism perhaps can only be solved by the United States Supreme Court constitutionally requiring pre-trial opt-in as to non-resident class members who have no minimum contacts with the forum. (emphasis added)

Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 81 (1983).[19] Presumably, competing class actions could be resolved only by a race to judgment[20] if neither personal jurisdiction nor opt-in is required. Such competing actions are not uncommon, as *Donovan, supra*, illustrates.[21] In summary, this

19 A requirement of opt-in (as opposed to opt-out) would be the substantial equivalent of a personal jurisdiction requirement, because it would assure that jurisdiction over class members could fairly be exercised.

20 Race to judgment would induce several undesirable kinds of behavior, including "stalking horse" litigation and intentional delay as a means of forum shopping. Furthermore, race to judgment is an unseemly and indeed irrational method of adjudicating controversies of overlapping jurisdiction.

21 See also authority cited in note 15 supra.

Court could not decree binding effect for multistate class actions without creating a number of disadvantageous consequences and without perpetually managing the complex body of federal law it would inevitably invent.

The response of plaintiff Shutts, in this case, to these arguments has uniformly been that Phillips should "pay" and avoid the "worry."[22] There is reasonable and genuine basis for dispute, however, as to both liability and damages. Shutts' arguments have involved the unprecedented abrogation of contractual provisions and the overriding of directly applicable Texas law, and a defendant faced with the demand that it "pay" in such a situation to avoid the "worry" is in a difficult position.[23] Furthermore, Shutts overlooks the need for a principled rule of general application, governing not only this case but all cases, and functioning workably in an interstate federal system.

C. *Absent, nonresident class members are in a position analogous to that of defendants in that they may suffer permanent adverse adjudications of their property rights.*

The rights of nonresident class members can be appreciated by considering a class action in which defendant prevails and judgement is rendered that claimants take nothing. Class claimants may then be in need of personal jurisdiction principles similar to those protecting defendants, because they face the cutoff of their rights by res adjudicata. Shutts has argued that these concerns lack merit, but plaintiffs have themselves objected to class certification in some cases. For example, the Dalkon

22 See, e.g., Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, No. 82-461 (U.S. S.Ct. 1983), at 6 (arguing that, "If Phillips were really worried about prospective due process denials to plaintiff class, it could pay the claims and prevent the worry"). This argument misconceives the issue.

23 See note 16 supra.

Shield plaintiffs [24] actually appeared in this Court in *Gillette Company v. Miner* [25] to oppose the plaintiff's argument on the ground that certification, in their case, would benefit the defendant [26] in a way unfair to the class.

Disposing of nonresidents' rights may be appropriate *if* they have intelligently and voluntarily submitted themselves to the jurisdiction of the court, for better or for worse. There are several reasons, however, that such consent cannot be inferred from the mere fact of notice in multistate class actions. First, a court lacking power to compel appearance has no authority to compel a putative class member to opt in or to opt out. [27] Absence of power to compel appearance is logically inconsistent with power to compel a legally binding choice through the compulsory filing of a paper with the court. Secondly, class notices

24 In re Northern Dist. of Cal. "Dalkon Shield" IUD Products Liab. Litig., 693 F.2d 847 (9th Cir. 1982).

25 Brief of Amicus Curiae on behalf of Plaintiffs in the "Dalkon Shield" IUD Products Liability Litigation, Gillette Company v. Miner, No. 81-1493 (U.S. S. Ct. 1982).

26 A similar argument was made in opposition to certification by plaintiffs in In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982). Dalkon Shield and Skywalk involved mandatory class actions and thus present slightly different issues; in both cases, however, the trial court had found notice and representation sufficient to satisfy due process.

In both mandatory and voluntary class actions, defendants may be free to unfairly influence the choice of forum if multistate class jurisdiction is allowed without nexus or contacts. Such was precisely the complaint of plaintiffs in the Dalkon Shield and Skywalk cases.

27 See Fisch, Notice, Costs, and the Effect of Judgments in Missouri's New Common-Question Class Action, 38 MO. L. REV. 173, 212 (1973); Comment, supra note 2, 69 IOWA L. REV. at 800; Note, Personal Jurisdiction and Multistate Class Actions: The Impact of World-Wide Volkswagen v. Woodson, 32 DRAKE L. REV. 441, 459 n. 133 (1983).

are not comparable in effectiveness to service of process.[28] They are notoriously poorly understood, and they generally prompt the reasonable lay recipient to throw them away because they give the illusion that legal effects can be avoided by inaction. Third, class notices are often written so as to mislead.[29] Finally, restrictions on the right to opt out are imposed in every class action, as they were here,[30] and such restrictions limit the voluntariness of submission.

The Kansas court concluded that these problems were solved by notice and representation. But this conclusion begs the question: why, then, are notice and representation not sufficient to bind a *defendant* who has no contact with the forum? A class can be composed of defendants, too; may a *defendant class* be bound by res judicata upon mere notice, when its members have no affiliating circumstances or nexus with the forum? The Kansas court's reasoning thus supports the cutoff of defendants' rights as well as it does those of plaintiffs.[31] This conclusion is consistent with the hypothesis that nonresident class members are actually in a position analogous to that of defendants in that they may lose their rights involuntarily.

28 See Miller, Problems in Giving Notice in Class Actions, 58 F.R.D. 313, 322 (1972); Comment, supra note 2, 69 IOWA L. REV. at 800 n. 41.

29 Cf. Aguchak v. Montgomery Ward Co., 520 P.2d 1352, 1356-58 (Alaska 1977) (holding standard-form summons unconstitutional because written so that non-lawyer could not understand his rights with respect to appearance, venue or other procedures). See also Kennedy, Class Actions: The Right to Opt Out, 25 ARIZ. L. REV. 3, 42-44 (1983); Miller, supra note 28, at 322.

30 Every class action, including the present one, necessarily imposes limits on the time and manner of opting out. See Comment, supra note 2, 69 IOWA L. REV. at 800 n. 41.

31 See Kennedy, Class Actions: The Right to Opt Out, 25 ARIZ. L. REV. 3, 38-39 (1983).

Notice and representation are only a part of due process. There are other essential parts, including an appropriate forum, with which notice and representation have nothing to do. Thus it is one thing to say that a class action may proceed without all parties physically present in the courtroom, but it is quite another to say that a forum with which the parties have had no contact may exercise jurisdiction over them.

II. KANSAS' SUBSTITUTION OF ITS OWN LAW FOR THAT OF OTHER STATES WILL LEAD TO "MAGNET" FORUMS FOR CLASS ACTIONS AND TO FRUSTRATION OF THE POLICIES ADOPTED BY OTHER STATES.

The Kansas court avoided some of the conflict of laws questions faced in *Miner v. Gillette Company* by the expedient of countermanding the Constitutions, legislation, and court decisions of Texas and Oklahoma. Kansas made clear that it will apply its own law in derogation of that of a different State even if the interests of the other State are more significant and even if the transaction took place in the other State between citizens of the other State.[32]

As the Kansas court appeared to recognize,[33] this holding creates the danger that resort to "magnet" forums may defeat the chosen substantive policy of other States. If other States were to adopt a similar approach, plaintiffs' attorney would be able in every class action to identify a "best" plaintiffs' forum. This magnet jurisdiction would be the State that would be most likely, among the fifty States of the union, to hold against the

32 Only if it is convinced that reasons to the contrary are "compelling" would Kansas do otherwise. Appendix A43.

33 "[T]his opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system." Appendix A24.

defendant, or the one that would award maximum damages.[34] Such a forum would ignore laws that would produce a defendant's judgment or a lower recovery. The frustration of the substantive regulatory choices made in the respective regulatory commissions, legislatures, or courts of other States would naturally follow. The effect would be similar to, but more direct, than that condemned by this Court in the famous case of *Erie RR. v. Tompkins.*[35]

In the present case, for example, Texas has strong interests in the relationship between oil and gas producers and royalty owners. This Legal Foundation has appeared in natural gas cases arising from both Texas and Kansas and would respectfully state to the Court that the jurisprudence of the two States differs dramatically. Kansas, in fact, is a maverick jurisdiction in oil and gas matters,[36] probably because a portion of the State produces

34 Ironically, the Kansas court applied Kansas law in part because "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." Appendix A43. In this, the court missed the point.

It was no accident that the action was filed in a forum in which the forum's law was adverse to the defendant to the maximum degree. Under these circumstances, it is not surprising that plaintiffs "desired" that law to apply. The question remained whether such application was consistent with the defendant's rights, a question the Kansas Court did not deem necessary to consider. Id. at A42-A43.

35 304 U.S. 64 (1938). The Erie Court emphasized the frustration of state policy resulting from substitution of law preferred by the forum, and it cited Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1932) to that effect. Precisely the same kind of frustration, as well as the same kind of forum shopping and discrimination as were concerns in Erie, would result from the Kansas Court's decision here.

36 For example, Kansas is one of very few jurisdictions that have enacted intrastate price controls lower than those that would be administered by the Federal Energy Regulatory Commission. See Energy Reserves Grour Kansas Power & Light Co., 459 U.S. 400 (1983). Kansas has inte. :ted its law together with federal law so as to

oil and gas but a larger and politically more powerful segment does not. Kansas' attitude toward producers has resulted in Kansas Supreme Court decisions that have been attacked by the Federal Energy Regulatory Commission in this Court on federalism grounds.[37]

Interest on suspense royalties is a case in point. The ability to suspend royalty is absolutely essential, since loss of the lease may follow even inadvertent underpayment and since lawful rates are frequently uncertain. The producer is often in the situation in which gas purchasers claim that he is overcharging and royalty owners claim that he is underpaying, and suspension of payment pending determination is the only way to assure against multiple liability. Respondent Shutts, reflecting the Kansas attitude, describes suspension as "wrongful."[38] But to the State of Texas, which protects the right to suspend and would require a non-punitive approach to interest, the Kansas approach seems calculated to discourage production. Furthermore, agreement on interest treatment of suspense royalties is a common and appropriate feature of oil and gas leases, but the Kansas court here nullified such agreements, even if made in Texas by Texas citizens. The Kansas approach amounts to imposition of higher energy costs on each of the other States, favors narrow interests of Kansas citizens, and might be opposed by Texas and Oklahoma as not leading to the best climate for oil and gas production in the long term.

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abrogate agreed pricing terms on gas sold in Kansas. Compare Mesa Petroleum Co. v. Kansas Power & Light Co., 229 Kan. 631, 629 P.2d 190, on rehearing, 230 Kan. 166, 630 P.2d 1129 (1981) with Pennzoil v. FERC, 645 F.2d 360 (5th Cir. 1981) (affirming contrary conclusion by FERC). Other examples are to be found in the Petition for Certiorari.

37 Brief of Federal Energy Regulatory Commission, Mesa Petroleum Co. v. Kansas Power & Light Co., No. 81-711 (U.S.S.Ct. 1981).

38 Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, 103 S.Ct. 725 (1983) (Shutts II), at 14, citing Shutts v. Phillips Petroleum Co., 222 Kan. 527, 552-53, 567 P.2d 1292 (1977) (Shutts I) (calling the possession of moneys by suspension "wrongful").

Another erroneous reading of Texas law is to be found in the Kansas court's unsupported assumption that limitations would bar these claims in all other forums.[39] On the contrary, Texas has a "savings" statute, which would have the effect of allowing the filing in the proper court of claims dismissed for want of jurisdiction, as though they had been filed as of the time they were filed in Kansas.[40] The Kansas court's summary statement that the claims would be time-barred without analysis of this statute is symptomatic of its disinclination to respect the laws of other States.

The point is not whether Kansas or Texas law is "better" policy. It is that this frustration of other States' policy is an inevitable feature of Kansas' choice of law approach. Furthermore, if the Kansas approach were generally adopted throughout the nation, it would create a magnet forum for every class action.

III. THIS CASE DOES NOT INVOLVE A COMMON FUND, AND THE REASONING OF THE KANSAS COURT WOULD APPLY WITH EQUAL FORCE TO REMOVE JURISDICTIONAL AND CHOICE OF LAW CONCERNS FROM EVERY MULTIPLE CLAIM CASE.

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39 The Kansas court erroneously stated, "if in this action Kansas is without jurisdiction, . . . this action would not toll the statute of limitation in [Texas]." This unsupported statement appears at Appendix A17 and is flatly in contradiction of the Texas Statute. See the following note.

40 Tex. Rev. Civ. Stat. Ann. art. 5539a (Vernon 1974).

It is true that the Texas statute would not "save" claims that were already time-barred when this action was filed, but there is no policy reason against that result. The Texas statute would preserve claims as of the date of filing of this action, contrary to the Kansas court's assertion.

The Kansas court's effort to support its decision by "common fund" reasoning[41] is erroneous and should particularly be rejected by this Court.[42] This action for damages[43] does not in any respect resemble the common fund cases,[44] and indeed the

41 The Kansas court used this reasoning to support both its jurisdictional conclusions and its choice of Kansas law. Appendix A12, A43.

42 The Kansas Court's reliance on Hansberry v. Lee, 311 U.S. 32 (1940), is misplaced for three reasons. First, the ambiguous reference to those "not within the jurisdiction" is most logically read as referring to those physically outside the state. It is less reasonable to consider this offhand remark as a major break with past jurisdictional concerns. Secondly, the phrase is dictum, because the class members in Hansberry were all residents. Third, Hansberry was decided in another constitutional era, before International Shoe v. Washington, 326 U.S. 310 (1945), and long before Shaffer v. Heitner, 433 U.S. 186 (1977) or Rush v. Savchuk, 444 U.S. 320 (1980).

43 The Kansas court expressly held that the action "is one for damages." Appendix A44. This conclusion would contradict the "common fund" conclusion even if there were no other reasons against it. See note 32 infra.

44 This Court's common fund cases are based on the rationale that if there is an identifiable, exhaustible res, which might be made the subject of inconsistent adjudications, it is appropriate to adjudicate all claims affecting the res in one proceeding, where the res is located. A common fund is like a single fixed pie against which there are claims by persons so related that, if their claims were differently adjudicated, the results would be inconsistent. For example, in Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915), the Court concluded that an insurer's safety fund, made of contributions, was necessarily treated as a unit because "[t]he fund was single . . . . It would have been destructive of [policyholder's] mutual rights to use the mortuary fund in one way . . . in one state, and to use it in another way . . . in another state." Id. at 670-71.

No such situation exists here. There would be no inconsistency if some claimants received one amount and others received whatever other amount, if any, might be due them; in particular, there would be no inconsistency if Texas claimants' claims were adjudicated in Texas under Texas law. There is, further, no reason for supposing

difficulty with the Kansas court's reasoning is that it is equally applicable to every class action.[45] It would authorize a magnet forum to ignore jurisdictional and choice of law concerns in virtually every such case.

CONCLUSION

Both the assumption of class action jurisdiction over nonresidents and the choice of law approach adopted by Kansas should be reversed.

Respectfully submitted,

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that their claims must be paid from a "fund" located in Kansas. Petitioner Phillips' characterization of this reasoning as judicial "alchemy" is justified.

45 The Kansas court's reasoning was based in large part upon the fact that the claims are similar. But common issues are a requisite of every class action. The court buttressed its conclusion by the argument that defendant did not segregate damages in advance in its accounting and that the defendant did business in the State. These conditions too may be expected in virtually every multistate class action.

PETITIONER'S

BRIEF

(10)

No. 84-233

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,
v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Kansas

---

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a state court in a class action, consistent with basic principles of federalism and the Due Process Clause of the Fourteenth Amendment, can exercise jurisdiction over unnamed class members and their claims when: (1) the class members are nonresidents who have had no contacts with the forum state; (2) the class members have not affirmatively consented to its jurisdiction; (3) the claims arose entirely in other states; and (4) the forum has no significant interest in them?

2. Whether a state court in a nationwide class action, consistent with the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution, can apply its own law to transactions between nonresidents that occur in other states and to which the forum has no connection?

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BRIEF FOR THE PETITIONER [1]

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (235 Kan. 195, 679 P.2d 1159) is set forth at page A2 of the Appendix. The unpublished order of the District Court of Seaward County, Kansas, is set forth at page A48 of the Appendix.

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[1] Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix to the Petition for Certiorari at page A68. Unless otherwise indicated, all Appendix citations are to the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on March 24, 1984. A motion for rehearing was filed before the Supreme Court of Kansas on April 13, 1984 and was denied on May 11, 1984. The Petition for A Writ of Certiorari was timely filed August 9, 1984 and was granted October 9, 1984. This Court's jurisdiction is based on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Article IV, Section 1 of the United States Constitution provides in pertinent part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State.

The statutory provision involved is Kan. Stat. Ann. § 60-223, which is set forth at page A65 of the Appendix to the Petition.

STATEMENT OF THE CASE

Petitioner, Phillips Petroleum Company (Phillips), a Delaware corporation with its principal place of business in Oklahoma, produced or purchased natural gas from oil and gas leases covering lands located in 11 states. A60-A64. Phillips sold some of the gas to pipeline companies for transportation and resale in interstate commerce at prices regulated by the Federal Power Commission (FPC). Phillips used some of this gas itself to manufacture carbon black, as a chemical feedstock for other products, and disposed of some of the gas in other transactions not involving a sale to a pipeline company.

The contractual arrangements between Phillips and either: (1) the producer from whom it purchased the gas, or (2) the royalty owners under the leases in properties where Phillips was the lessee, varied considerably. Under the most common arrangement, either the purchase price of the gas or the royalty was calculated by reference to the price received by Phillips for gas sold in certain counties in Oklahoma and Texas. When Phillips was a purchaser of gas, Phillips generally contracted with the producer to pay royalties to the royalty owners under the producer's leases with those owners as the producer directed.

Phillips was required to obtain FPC approval of price increases for gas sales, but was permitted to collect the higher prices pending final approval, subject to refund to the purchasing pipeline companies if any part of the price increases was not finally approved. FPC regulation 18 C.F.R. § 154.102(b), required Phillips to file a general undertaking and agreement binding Phillips to return to purchasers amounts collected under disapproved rates with interest at a fluctuating rate determined by reference to Treasury Bill interest rates. After a price increase finally was approved, Phillips would compute and pay royalties based on the higher price for gas produced during the time that Phillips was allowed to sell at that higher price. Payments of additional royalties were made between December 30, 1975 and July 1, 1980 after final resolution of court challenges to FPC Opinions 699, 749, and 770.

When a new rate increase order was promulgated, Phillips would notify royalty owners of the rate proceeding. The notice informed royalty owners that they could receive royalties computed at the higher rate if they agreed to reimburse Phillips for any overpayment of royalties resulting from the denial of all or a portion of the price increases.

In this Kansas state court action, three named royalty owners, for themselves and on behalf of all royalty owners to whom Phillips paid royalties, seek to recover interest on the additional royalties paid by Phillips.[2] One of the named class representatives, Irl Shutts, is a resident of Kansas, and the other two, Robert and Betty Anderson, are residents of Oklahoma. The three named plaintiffs own oil or gas leases in Oklahoma and Texas, but not in Kansas.

Phillips moved to dismiss the unnamed nonresident plaintiff class members and their claims on the ground that the state court could not constitutionally exercise jurisdiction over them. See Answer, Pretrial Motion and Counterclaim, Joint Appendix, p. 9. On May 1, 1982, the trial court denied the motion and certified a nationwide class of approximately 33,000 plaintiffs.[3] Phillips then brought an original mandamus action in the Supreme Court of Kansas. On June 28, 1982, the Supreme Court of Kansas denied the petition without opinion. Phillips unsuccessfully petitioned this Court for certiorari. *Phillips Petroleum Co. v. Duckworth*, 459 U.S. 1103 (1983).

This case was tried in the District Court of Seward County, Kansas on January 27, 1983, and on May 20, 1983, Phillips was held liable to approximately 28,100 class members for interest computed pursuant to Kansas law.[4] The lower court awarded interest to the royalty owners at the rate set by federal regulation applicable to Phillips' obligation to its pipeline purchasers. Phillips appealed and on March 24, 1984, the State Supreme Court affirmed the trial court's exercise of jurisdiction over the entire class, and upheld the application of Kansas law to all the contracts and transactions involved in the case. The court also increased the post-judgment rate of interest from the FPC rate to the higher 15 percent Kansas statutory judgment rate.

[2] A copy of the Petition is set forth at page 3 of the Joint Appendix.

[3] The journal entry commemorating this order of the trial court appears at page 17 of the Joint Appendix.

[4] The 33,000 original class members were reduced by approximately 2,400 who elected to opt out, and by approximately 1,500 to whom notice could not be delivered.

The Kansas Supreme Court concluded that jurisdiction was proper over all class members saying that Kansas had a "legitimate interest" in adjudicating the claims because Phillips does business and owns property in Kansas. This "interest" was said to be enhanced because the lawsuit involved the oil and gas industry, an industry that is "significant" in Kansas. The court below also specifically held that jurisdiction was not dependent upon the existence of any contacts between the absent nonresident class members and the forum.

The Kansas Supreme Court decided that Kansas law should be applied to all class actions brought in Kansas, except when "compelling reasons" require the application of another state's law. The application of Kansas law was not thought to depend upon there being any contacts between the class members or their claims, and the forum.

Fewer than 2.7 percent of the class members are residents of Kansas, less than one-quarter of one percent of the involved leases are located in Kansas, and Kansas leases account for only .003 percent of the additional royalties. A9. Yet, the judgment holds Phillips liable under Kansas law to a class consisting of royalty owners residing in all 50 states, the District of Columbia, the Virgin Islands, and several foreign countries.

Other states have far greater interests in this litigation than Kansas. For example, a majority of the leases and a plurality of those people who received additional royalties are located in Texas. A62-A64. Oklahoma, which is Phillips' principal place of business, has the next

largest percentage of both royalty owners and leases. All of the royalty payments and the notices to royalty owners concerning the price increases were sent by mail from Oklahoma.

Of the approximately $11.3 million in additional royalties paid, Texas residents received $4.7 million; Oklahoma residents $1.3 million; Kansas residents only $123,000. Oklahoma, Texas, Louisiana, New Mexico, and Wyoming each have more of the involved leases located within their boundaries than does Kansas, and the additional royalties attributed to the leases in these states are substantially greater than the royalties related to Kansas leases. The tables at A62-A64 show other states with a far greater interest in this litigation than Kansas. By any measure, the "Kansas connection" is truly *de minimis*.

SUMMARY OF ARGUMENT

This Court has never approved the exercise of jurisdiction by a state court over nonresidents who have no "contracts, ties, or relations" with the forum state, and who have not voluntarily appeared in the action. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See also Pennoyer v. Neff*, 95 U.S. 714 (1877). Although this Court has not expressly held the Constitution's jurisdiction limitations applicable to nonresident plaintiffs in a class action, the standard must be the same, since there can be no constitutionally significant difference between the extinguishment of a claim of a nonresident plaintiff class member, and the imposition of a liability on, or the extinguishment of a claim of, a nonresident defendant. Prior cases do not justify any other conclusion.

Moreover, the choice of law rule adopted by the court below resulted in 100 percent of the class members' claims being adjudicated by a state that had a legitimate

interest in, at most, only three percent of those claims. The holding encroaches upon Phillips' rights and the nonresident class members' rights under the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution. The court below arbitrarily applied forum law to thousands of nonresidents and transactions with which Kansas had no "significant contact or significant aggregation of contacts, creating state interests" that constitutionally would permit the use of Kansas law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

Finally, the decision below represents an unprecedented encroachment by the Kansas judiciary upon the judicial power of other states that interferes with the orderly administration of their laws in a manner inconsistent with the principles of federalism protected by the Due Process and Full Faith and Credit Clauses. The court below totally disregarded each state's sovereign power to try causes in its courts under its own law, a power that has been retained by the several states under the Constitution. Under the jurisdiction and choice of law rules applied by the Kansas Supreme Court, the policies of other states with respect to conduct within their borders will be ignored or incorrectly or inconsistently applied. The result surely will be forum shopping and conflicts of jurisdiction among the states. These interferences with state autonomy and the orderly administration of the laws cannot be justified when no legitimate forum state interest is served thereby.

A uniform jurisdiction standard applicable to both nonresident plaintiff class members and nonresident defendants coupled with meaningful limitations on applying forum law in national class actions must be imposed on state courts to protect the interstate federalism embodied in the Constitution.

ARGUMENT

I. THE ASSERTION OF JURISDICTION OVER NONRESIDENT CLASS MEMBERS BY THE COURT BELOW EXCEEDS THE CONSTITUTIONAL LIMITS ON STATE COURT JURISDICTION ESTABLISHED BY THE CONTROLLING DECISIONS OF THIS COURT.

A. The Court Below Ignored The Constitutional Standard Established By This Court Requiring A Relationship To Exist Between A Forum State And A Nonresident To Support Jurisdiction.

The decisions of this Court require a substantial relationship to exist between a state and any individual over whom its courts seek to assert jurisdiction. To achieve that objective, this Court, in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), adopted a flexible "minimum contacts" standard by which to measure the sufficiency of that relationship. It also expressly stated that the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." 326 U.S. at 319. Since then, this Court always has insisted that the necessary relationship exist. This principle was applied recently in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980), in which this Court stated:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.

The requirement of a relationship between the forum state and an individual over whom it seeks to assert

jurisdiction is fundamental, as evidenced by several recent cases in which this Court has held state court assertions of jurisdiction over nonresidents unconstitutional because sufficient contacts were absent. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, —— U.S. ——, 104 S. Ct. 1868 (1984); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977). Indeed, in *Shaffer v. Heitner*, 433 U.S. at 212, the Court stated:

> We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standard set forth in *International Shoe* and its progeny.

Notwithstanding this and other clear statements in this Court's decisions, the court below held that the *International Shoe* standards were "inapplicable to nonresident plaintiffs in a class action . . . ." A12. The Kansas court reasoned:

> "Because a class action must necessarily proceed in the absence of almost every class member, we hold the residential makeup of the class membership is not controlling. . . . What is important is that the nonresident plaintiffs be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation. . . . Therefore, while the essential element necessary to establish jurisdiction over nonresident defendants is some 'minimum contacts' between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process."

A12, *quoting Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 542-43, 567 P.2d 1292, 1305 (1977), *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*). In restricting the application of *International Shoe* and the cases building

upon it, the Kansas Supreme Court below has created an unsound and unconstitutional distinction that is not justified by this Court's decisions.

A cause of action "is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). An adverse judgment is no less intrusive upon a plaintiff class member's property interest than any other adverse judgment. A class action judgment has the same *res judicata* effect as an individual judgment denying a claim. When entered, the unnamed plaintiff's claim is extinguished, thereby depriving the class member of property to the same extent as any other adverse judgment. There is no constitutionally significant distinction between the property rights involved in adjudicating a cause of action of a nonappearing nonresident plaintiff and those involved in adjudicating the obligations of a nonappearing nonresident defendant. In either case, the state purports to reach beyond its borders to affect a nonresident's substantial property interests.[5]

A party's designation as plaintiff or defendant often results more from the formal posture of the action than from any inherent difference in the nature of the rights being adjudicated.[6] A declaratory judgment action, for

[5] The Uniform Class Action Act limits jurisdiction over nonresident class members to those instances when jurisdiction in an individual action against the nonresident would be proper and contains an optional provision allowing jurisdiction over nonresidents whose state of residence has approved the assertion of jurisdiction. National Conference of Commissioners on Uniform State Laws, Uniform Class Action [Act] [Rule] § 6. *See* Scher, *Uniform Class Action Act: A Critical View*, 63 A.B.A.J. 840, 842 (1977). Kansas has not adopted the Act, thus it is unavailable for a basis for jurisdiction.

[6] One cannot even assume that the parties identified as plaintiffs voluntarily brought suit to determine their claims. Kansas law, for example, permits making certain unwilling participants involuntary plaintiffs. Kan. Stat. Ann. § 60-219.

instance, may be filed by a party who seeks to establish the nonexistence of a contract claim by the defendant. The same action, with the parties reversed, may be initiated as a breach of contract suit. Thus, formal party designations may reflect only the result of a race to the courthouse. Because the labels "plaintiff" and "defendant" do not necessarily distinguish the underlying interests of the parties, the Constitution's limitations on state court jurisdiction over a nonconsenting nonresident plaintiff claimant must be the same as those applicable to jurisdiction over a nonresident defendant.[7] A state's jurisdiction to deny or foreclose a nonresident's claim should not be subject to lesser constitutional scrutiny than its jurisdiction to impose a liability on a nonresident.

This Court's precedents do not support the creation of a jurisdictional distinction based upon party designation; rather, jurisdictional limitations extend to all parties and protect claims of nonresidents. As recently as *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), this Court held that due process requirements "protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." In *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916), a Pennsylvania court was not permitted to assert interpleader jurisdiction over a nonappearing nonresident claimant to proceeds of an insurance policy. In *Estin v. Estin*, 334 U.S. 541 (1948), this Court again recognized that an attempt to extinguish a claim of a person beyond the state court's jurisdiction was nothing more than "an attempt to exercise an *in personam* jurisdiction over a person not before the court." 334 U.S. at 549. *See also Hanson v. Denckla*, 357 U.S. 235 (1958) (assertion of jurisdiction over non-

[7] This Court, in other contexts, has analyzed the rights of a plaintiff under the same standards as those governing defendants. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

appearing nonresident trustee who was a mere stakeholder was improper).

The combined effect of Kansas' expansive jurisdiction position and that state's class action statute, which requires an absent class member to take affirmative action to avoid being included in the class, results in a rule that violates the due process interests of the absent class members and is tantamount to jurisdiction over nonresidents by default. Kansas has arrogated to itself the power to compel a nonresident to take affirmative action to avoid its jurisdiction.[8] This Court, however, repeatedly has said that the "unilateral activity of those who claim some relationship with a nonresident" is not constitutionally sufficient to satisfy due process requirements. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* —— U.S. ——, 104 S. Ct. at 1873; *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 298 (1980); *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). A state that does not have the power to compel a nonresident to submit to its jurisdiction logically cannot have the power to compel that nonresident to take affirmative action to avoid its jurisdiction. It still must be taken as established that "a court cannot conclude all persons interested by the mere assertion of its own power . . . ." *Chicago Life Ins. Co. v. Cherry,* 244 U.S. 25, 29 (1917).

The situation in the present case stands in sharp contrast to *Keeton v. Hustler Magazine, Inc.,* —— U.S. ——, 104 S. Ct. 1473 (1984), in which the nonresident plaintiff voluntarily chose a forum in which she suffered damage. As indicated by earlier decisions of this Court, a plaintiff may submit to the jurisdiction of a court voluntarily, by affirmative act.[9] In the present case, however, it cannot be said that the nonresident class members affirmatively chose the forum and, unlike Keeton, those class members did not suffer any damage in Kansas. In this case, as discussed further below, there is absolutely no relationship between Kansas and the nonresident class members.

[8] A nonresident defendant with no contacts with a forum state need take no action to avoid being bound by a judgment. "The defendant would be free to rely upon his defense [of lack of jurisdiction] by letting judgment go by default." *Chicago Life Ins. Co. v. Cherry,* 244 U.S. 25, 30 (1917). Under the Kansas rule a nonresident plaintiff is denied that option. *Cf.* Kennedy, *Class Actions: The Right To Opt Out,* 25 Ariz. L. Rev. 3, 81 (1983).

By reaffirming its opinion in *Shutts I*, the Kansas court suggested that in *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court granted state courts jurisdiction over plaintiffs in class actions, whether or not minimum contacts exists between the absent plaintiff and the forum. That case, however, did not even present an issue of state court jurisdiction because all class members in *Hansberry* appear to have been residents of the forum state, and because the land in question also was in that state. In that case, this Court simply observed in passing that courts sometimes are called upon to proceed with causes in which joinder of all those interested is difficult or impossible because, *inter alia*, "some are not within the jurisdiction." 311 U.S. at 41. This dictum, which has nothing to do with due process requirements, is what the court below relied upon to justify its position. The *Hansberry* statements merely articulate the rationale of the class action device and identify the procedural steps nec-

[9] Once voluntarily before the court, the plaintiff even may be subject to jurisdiction for counterclaims. "The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence." *Adam v. Saenger,* 303 U.S. 59, 67-68 (1937).

essary to adjudicate claims of a class over which the state court has jurisdiction.

This Court's citations in *Hansberry* of *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1914), and cases following *Ibs*, reinforce this conclusion. In *Ibs*, this Court specifically addressed the question of jurisdiction over nonresidents and found an independent basis for jurisdiction to exist before discussing the propriety of the class action procedure. 237 U.S. at 671. In *Christopher v. Brusselback*, 302 U.S. 500 (1938), also cited in *Hansberry*, it was held that personal liabilities of stockholders could be enforced only "in a court having jurisdiction to render a judgment against them *in personam*," 302 U.S. at 502, and that, when no basis for jurisdiction existed, the federal class action procedure provided for by former Equity Rule 38 was inapplicable. 302 U.S. at 505. The citation of these cases in *Hansberry* clearly indicates that this Court had no intention of abandoning the traditional requirements of personal jurisdiction in class actions.[10]

Moreover, *Hansberry* was decided in 1940, five years before *International Shoe* and long before the development of the modern, elaborate, and far reaching class action of the kind employed in this case. Whatever its impact, the *Hansberry* dictum must be read as pertaining to a jurisdiction era controlled by strict notions of "presence" and "consent." Indeed, it must be seen as pertaining to a time when class actions were limited to situations in which class members had a defined community of interest in property or contract. It was wholly

[10] In the subsequent decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court maintained the distinction between jurisdiction and other procedural steps necessary to bind parties. In *Mullane* the Court addressed the jurisdiction issue separate and apart from the issue of the validity of New York's notice and representation procedure utilized in settling the accounts of a trust in that state having numerous nonresident beneficiaries. 339 U.S. at 311-13.

inappropriate for the Kansas court to read *Hansberry* as authority for departing from the more flexible minimum contacts test of *International Shoe* developed years after the oblique dictum in *Hansberry*, and applying that language to a class action in which the members shared nothing more than, at best, some common questions of fact or law.[11]

The decision below is based on a startling proposition—the "common question" class action, a mere procedural device intended to facilitate joinder of similar but unaffiliated claims, can subvert, by itself, the well established constitutional limitations on state court jurisdiction applicable to claims litigated individually. It was unreasonable for the Kansas court to assume that this Court would have adopted such an unsupportable notion in *Hansberry*, a case in which the nature of the class action was entirely different and the jurisdiction issue was not in any way presented.

Yet, the court below elevated the "common question" class action from a procedural device, designed to facilitate the resolution of similar but unaffiliated claims, to an independent source of jurisdictional power that can bypass the constitutional principles articulated by this Court and operate even when no contacts exist between nonresidents and the forum. Thus, Kansas' adoption of a procedural rule, by a process in which nonresidents cannot participate, was deemed sufficient by itself to subject nonresident class members to the judicial power of that state's courts. A state cannot constitutionally create

[11] Until Federal Rule 23 was amended in 1966, a court could adjudicate common questions in a "spurious" class suit, but that proceeding did not purport to bind class members who chose not to intervene. "When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in litigation, which might or might not be accepted. It was an invitation and not a command performance." 3B *Moore's Federal Practice Appendix* ¶ 23.10[1]. Accordingly, the issue posed in this case could not have arisen prior to 1966, more than a quarter of a century after *Hansberry*.

or exercise this power simply by enacting a class action rule.

Nor can the result below be upheld because Kansas wants to provide a forum for its citizens and believes the national class action is an efficient mechanism for doing so. A state's interest in securing relief for its citizens cannot outweigh the due process right that protects a defendant from litigation in an improper forum.[12] Moreover, in this case there is no legal barrier to the Kansas class members obtaining full relief in Kansas without the nonresident plaintiff class members. Indeed, Kansas' interest in asserting jurisdiction over the latter group is nonexistent, and its claim of efficiency has an exceedingly hollow ring to it. If a Kansas plaintiff, like Irl Shutts, desires to maximize the size of the class in an action against Phillips, there is no unfairness in requiring him to travel to a forum having a relationship with a larger number of class members.[13] This Court's restrictions on personal jurisdiction over nonresident defendants always have required some plaintiffs to litigate outside their home states.

This Court has refused to sacrifice due process rights on the altar of judicial efficiency. Thus, the "efficiency" of prejudgment replevin statutes could not outweigh the individual rights secured by the Due Process Clause, which

> is not intended to protect efficiency or accommodate all possible interests . . . . "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

[12] Even when the defendant has a very limited interest in the outcome of the litigation, a state's interest in providing a forum for one if its citizens cannot justify jurisdiction. *See Rush v. Savchuk*, 444 U.S. 320 (1980). *See also Kulko v. California Superior Court*, 436 U.S. 84 (1978) (state interest in support of resident child not sufficient to outweigh rights of absent parent in child support controversy).

[13] The plaintiff class would have been better served if the Andersons had pursued their original Oklahoma action utilizing that state's "opt in" class action statute, Okla. Stat. Ann. tit. 12, § 14—that would have avoided the jurisdictional issue.

Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972), *quoting Stanley v. Illinois*, 405 U.S. 645, 656 (1972). In a similar manner, claims of judicial efficiency cannot defeat the requirement that a nonresident be bound only by a state with which he has minimum contacts.

Upholding the decision below would grant states final and unbridled power to extend the jurisdictional limits of their courts and would vitiate this Court's holdings that focus on the relationship between the conduct of the nonresidents and the forum. It would eliminate the due process requirement that a nonresident's "conduct and connection with the forum state [be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297. If minimum contacts is inapplicable in class actions, then the possibility that any state may entertain a nationwide class action deprives both defendants and potential class members of any "degree of predictability" that would allow them to "structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit." *Id.*

B. There Is No Relationship Between Kansas And The Nonresident Class Members.

The connection among the nonresident class members, Phillips, Kansas, and this litigation consists of nothing other than: (1) Phillips' operation of no more than 15 Kansas leases that represented less than one-quarter of one percent of all the leases and generated less than .003 percent of the additional royalties involved in this litigation; and (2) Phillips' payment of royalties to Kansas

residents who comprised less than three percent of all class members, and who received less than two percent of the additional royalties. The remaining 99.75 percent of the leases involved land located in 10 states other than Kansas. The remaining 97 percent of the royalty owners resided in the 49 states other than Kansas, the District of Columbia, the Virgin Islands, and several foreign countries.

The record compels the conclusion that there is a complete absence of contacts between the nonresident class members and Kansas. Separate contracts govern the relationship between Phillips and the individual royalty owners and the rights under those contracts vary from state to state. Class members who are not residents of Kansas have had no contacts with the leases in Kansas or the payment of additional royalties to Kansas residents. The nonresidents had no reason to believe or foresee that they were establishing any contact with Kansas.[14]

The only "affiliating circumstances" between the forum and the litigation divined by the court below justified the assertion of jurisdiction is Phillips' presence in Kansas. Since Phillips does business in every state, the Kansas court seems to be saying that a class action for interest on additional royalties could be brought against Phillips in any state, and each state would have a legitimate interest in that entire litigation. Phillips' contact, however, provides no basis for connecting either the absent plaintiffs or this litigation to Kansas. An attempt to secure jurisdiction over one party on the basis of another's connection with the forum was labeled "plainly unconstitutional" by this Court in *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

No "affiliating circumstances" can be found in the Kansas court's assertion that "[o]il and gas production

[14] It is conceivable that a small number of nonresident class members may have an interest in one or more of the 15 Kansas leases. The record is silent, however, on this point. At best, these interests are *de minimis*.

is a significant industry in this state." A28. The oil and gas industry is "significant" in each of the states in which Phillips had leases. The Court cannot assume that Texas, Oklahoma, Louisiana, and the other states involved would be willing to cede regulation of their oil and gas sector to Kansas.[15] Moreover, whatever may be the significance of the oil and gas industry to Kansas, it provides no "affiliating circumstances" between Kansas and the thousands of nonresidents swept into this class action—their leases relate to lands in other states.

Nor did the nonresident class members voluntarily appear or otherwise consent to the jurisdiction of Kansas. Although Kan. Stat. Ann. § 60-223 gives parties in certain cases the right to "opt out" and exclude themselves from the litigation, thereby avoiding the binding effect of the judgment, a failure to opt out cannot be considered a manifestation of consent to jurisdiction. More often than not, a failure to respond to a class notice will result from "ignorance, timidity, unfamiliarity with business or legal matters" or mere unconcern. *Cf.* Kaplan, *Continuing Work on the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 398 (1967). Moreover, a failure to opt out cannot bestow jurisdiction on a state court under the guise of "implied consent." "Implied consent" is a legal fiction that is effective to support jurisdiction only when there already are contacts with the forum state "of such a nature as to justify the fiction." *International Shoe Co. v. Washington*, 326 U.S. 310, 318-19 (1945). Simply stated, if a court does not have the power to compel a party to act, a failure to act cannot have any legal, let alone jurisdictional, significance.

[15] In *Rush v. Savchuk*, 444 U.S. at 332-33, the Court noted that a total absence of contacts was determinative notwithstanding the presence of other factors, such as a state's interest in adjudicating the claim.

In fact, the Kansas court's holding does not even rely upon the ability of class members to opt out as a basis for conferring jurisdiction. A18-A19. Presumably, the Kansas Supreme Court would permit a national class action from which a plaintiff cannot opt out, as long as "notice" and "adequate representation" were present.[16]

Applying this Court's analysis in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the decision of the court below must be reversed because there is "a total absence of those affiliating circumstances that are a necessary predicate to *any* exercise of state court jurisdiction." 444 U.S. at 295 (emphasis added). The nonresident class members "carry on no activity whatsoever" in Kansas. *Id.* "They avail themselves of none of the privileges and benefits" of Kansas law. *Id.* It is inconceivable that the nonresident class members could "reasonably anticipate being haled into court there." 444 U.S. at 297. Nor have these nonresidents "purposefully avail[ed themselves] of the privileges of conducting activities within the forum State," as required by *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In summary, the nonresident class members have had absolutely no "constitutionally cognizable contact with" Kansas. Neither the minimum contacts nor the consent needed to permit state court jurisdiction over nonresidents under the requirements of this Court's precedents over the past 107 years is present. Because of the lack of any "contacts, ties, or relations" with Kansas, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 299, the Kansas Supreme Court's judgment must be reversed.

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[16] Although the Kansas court limits its holding to plaintiff class members, the identity of interests in avoiding litigation in a foreign court shared by a defendant seeking to avoid a liability and a plaintiff seeking to protect a cause of action raises the possibility that the Kansas holding easily could be extended to defendant class actions. Is the extinguishment of a cause of action of a plaintiff class member constitutionally dissimilar from the imposition of a liability on a defendant class member? We submit it is not.

C. The Result Below Cannot Be Justified Under The "Common Fund" Cases.

The Kansas court mistakenly relied upon this Court's "common fund" cases to provide: (1) a basis for its holding that due process requirements were met, notwithstanding the absence of any nexus between the class action and the forum, A13; and (2) a contact between the nonresidents and the litigation justifying jurisdiction in Kansas. A28.[17] But that court's transmutation of this Court's "common fund" cases to cover the present factual situation is sheer alchemy.

There is not and never was any "fund" in Kansas.[18] This case involves nothing but a collection of individual contract claims by property owners related to royalties on

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[17] The "common fund" characterization also was invoked by the court to rationalize the application of Kansas law. See page 29 below.

[18] In *Shutts I* the Kansas court created a fund of monies held by Phillips, but "which never did or could belong to Phillips." 222 Kan. at 560, 567 P.2d at 1316. This supposed "fund" consisted of a portion of the additional proceeds collected by Phillips under the FPC suspense procedures that either would be returned by Phillips to the pipeline purchasers if the rate increase ultimately was denied, or would be paid to the royalty owners if the rate increases ultimately were approved. The Kansas court held that this portion of the additional proceeds constituted a "common fund."

In *Shutts II* no such fund could exist since the evidence showed that Phillips used a large portion of the gas itself and did not collect increased proceeds by selling that gas; therefore, it could not be aggregated into a "fund." The court below imposed the obligation to pay interest on these amounts on the basis of the contractual arrangements between Phillips and royalty owners. A33-A34. In effect, it created a "fund" by aggregating the contract claims of the individual royalty owners.

In both cases, the payment of all additional royalties had been made long before suit was brought. Thus, if anything that could have been called a "fund" ever existed, it certainly had ceased to exist before either lawsuit was filed.

gas production in 11 different states.[19] The nonresidents' claims are not in Kansas, and are not dependent upon Phillips ever having any funds in Kansas to satisfy them. Even if a "fund" could be fabricated by some feat of prestidigitation, the different laws of the various states that govern the contract claims would prevent the "fund" from being "common"; even if one state's law governed, the rights of the class members are not "common" because each still must depend upon individual contractual relationships.

Moreover, the Kansas court failed to recognize that the decisive factor in the "common fund" cases was the significant affiliating circumstances among the defendant, the forum, and the litigation.[20] In the very cases cited by the Kansas court, the initial judgment was rendered by a court in the defendant's state of incorporation, the causes of action arose and were determined by the laws of the forum state, and that state had the most significant interest in the dispute.[21] Indeed, in *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915), this Court explicitly held

[19] This Court has made clear in the analogous context of interpleader that contract claims are personal and require satisfaction of the usual rules of state court jurisdiction. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

[20] In the "common fund" cases, "[n]onresidents had purposefully associated with entities or individuals situated in the forum state or enjoying a unique relationship with it, and there was a legal or practical necessity that any determination of the rights of persons actually before the court be applied uniformly to all others similarly situated." Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 725-26 (1979) (footnotes omitted).

[21] *E.g., Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915) (judgment erected as bar was decided in defendant's home state, under that state's law, where the fund was maintained). *Accord, Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531 (1915).

that a "common fund" class action "should be brought in a court of the state where the company was chartered and where the . . . fund was kept." 237 U.S. at 672.[22] The Kansas Supreme Court's approach requires only that a single party having a claim that is alleged to be in common with others be a resident of the forum state. This Court's precedents do not support such a bizarre proposition.

Kansas' extension of its jurisdiction to embrace nonresident claimants to a mythical "fund" supposedly held by Phillips, a nonresident that happens to do business in Kansas, does violence to basic jurisdictional principles. In *Estin v. Estin*, 334 U.S. 541 (1948), this Court stated that "we are aware of no power which the state of domicile of the debtor has to determine the personal rights of the creditor in the intangible" unless the creditor was subject to the jurisdiction of the court. The Court then noted that: "The existence of any such power has been repeatedly denied." 334 U.S. at 548. Kansas has defied that statement.

Compounding its error, the court totally ignored the changes in jurisdictional thinking since the "common fund" cases were decided. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), this Court held that the "quasi-in rem" characterization of a case does not immunize it from minimum contacts requirements when it said: "[A]ll assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U.S. at 212. Conjuring up a *res* from a series of disconnected contract claims and combining it with Phillips' completely unrelated activities in Kansas certainly is not a basis for asserting jurisdiction. *Id.* Through the expedient of using the nomenclature of the "common fund" cases as an exception to

[22] If a "fictional fund" can be engrafted on the *Ibs* tree, the jurisdiction root for this case is either in Delaware or Oklahoma, not in Kansas.

the minimum contacts requirement, and by aggregating individual claims into a "common fund," the Kansas court bypassed every due process safeguard enunciated by this Court since *International Shoe* and resurrected the discredited regime of *Harris v. Balk*, 198 U.S. 215 (1905).

Logically extended, the Kansas court's unbounded approach allows any aggregation of individual personal claims of class members to be transformed into a "common fund." This overreaching "common fund" rationale then acts as an all-embracing justification for asserting state court jurisdiction and applying forum law. This fiction, unless repudiated, will remove class actions from the normal operation of constitutional guarantees. The fiction cannot be supported by this Court's decisions and must be rejected.

II. THE APPLICATION OF KANSAS LAW BY THE COURT BELOW IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE FULL FAITH AND CREDIT CLAUSE OF ARTICLE FOUR, SECTION ONE OF THE CONSTITUTION.

The Kansas court, after holding that no contacts need be present among the nonresidents, their claims, and Kansas in order to entertain a class action went further and held that "the law of the forum should be applied unless compelling reasons exist for applying a different law." A43.[23] One need look no further than this Court's

[23] Although Phillips argued the applicability of foreign states' laws before the trial court and the Kansas Supreme Court, and demonstrated how the laws of other states led to different results, the court below found that no "compelling reasons" existed to look to the law of any other state. What more compelling showing could be made than to demonstrate, as Phillips did: (1) Prior Kansas cases, including *Shutts I*, adopted a choice of law rule that required examination of foreign states' laws; (2) the transactions are completely unrelated to the forum; and (3) the proper application of the laws of other states leads to different results?

most recent statement on choice of laws to see that the application of Kansas law is repugnant to the Constitution.

> [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its laws is neither arbitrary nor fundamentally unfair.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981). The Kansas court's parochial preference for Kansas law can only be characterized as "irrational and lawless in a properly functioning federal system." von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections On Hague*, 10 Hofstra L. Rev. 35, 49-50 (1981).

This Court need not even re-examine its controversial holding in *Allstate Ins. Co. v. Hague*,[24] to conclude that the choice of law rule adopted below is unconstitutional. In that case, forum law was allowed to apply to an insurance contract to permit recovery by a forum resident for the death of her husband who had worked in the forum for an extended period of time. In this case, there is a fatal total absence of the comparable contacts that would give rise to a proper Kansas interest justifying the application of that state's law to the nonresident class members' claims. More than 97 percent of the claims asserted are made on behalf of class members who are not

[24] A number of commentators have argued that the contacts in *Allstate Ins. Co.* were insufficient to allow the application of forum law. *See, e.g.*, Brilmayer, *Legitimate Interests In Multistate Problems: As Between State and Federal Law*, 79 Mich. L. Rev. 1315, 1326-30 (1981); Silberman, *Can The State of Minnesota Bind the Nation?: Federal Choice of Law Constraints After Allstate Ins. Co. v. Hague*, 10 Hofstra L. Rev. 103 (1981); von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 Hofstra L. Rev. 35 (1981).

residents of Kansas. Indeed, there is not even a showing that any of these 97 percent work in Kansas or ever have set foot in Kansas.

The *Allstate Ins. Co.* holding cannot be stretched to encompass the application of forum law to the claims of named and unnamed plaintiffs who do not live in Kansas or even move to Kansas, but instead simply initiate suit in Kansas or fail to object to suit in Kansas, possibly "for the purpose of finding a legal climate especially hospitable to [their] claim[s]." 449 U.S. at 319. The present situation does not even rise to the level of the state interests present in *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), in which a post-occurrence change of residence to the forum was insufficient to permit application of forum state law.

The location of the occurrence giving rise to the cause of action, a fact properly considered in determining choice of law, *Allstate Ins. Co. v. Hague*, 449 U.S. at 314 n.19, also does not support the application of Kansas law to the more than 99 percent of the class members who do not have any interest in the handful of Kansas oil and gas leases involved in this litigation. All payments to class members were made from Oklahoma. No activity took place in Kansas with regard to the nonresident class members.

Moreover, application of Kansas law results in "unfair surprise" and the "frustration of legitimate expectations" of Phillips. 449 U.S. at 318 n.24. The contractual arrangements between a royalty interest owner, the producer of gas, and the gas purchaser necessarily are tied to the state in which the lease is located. Thus, the present case goes far beyond the situation in *Allstate Ins. Co. v. Hague*, 449 U.S. at 318 n.24, in which the contract itself recognized that the forum's law might be applicable because it was an ambulatory insurance contract that offered continental coverage. Moreover, as noted by this

Court, Allstate "was undoubtedly aware that Mr. Hague was a Minnesota [forum state] employee." *Id.*[25]

Thus, with respect to over 97 percent of the claims, nothing even remotely related to the contractual relationship giving rise to the nonresidents' claims ever was done or required to be done in Kansas. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1929). All acts connected with the formation and implementation of the contracts covering non-Kansas leases occurred outside Kansas. *Id.* Similarly, all things regarding their performance were done, and were required to be done outside Kansas. *Id.* Neither Kansas law nor the Kansas courts were involved in these leases for any purpose except when they were invoked by the named class representatives in this suit. *Id.* Under these circumstances, Kansas must be held to be "without power to affect the terms of [the underlying] contracts . . . . Its attempt to impose a greater obligation than that agreed upon . . . violates the guaranty against deprivation of property without due process of law." *Id.*

The Kansas court gave three reasons for applying Kansas law.[26] First, "the forum has a significant legiti-

[25] In *Allstate Ins. Co.*, this Court noted that Allstate was present in the forum, so "Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved." 449 U.S. at 317-18. Phillips is present in Kansas and may have been aware of the Kansas court's tendency to export Kansas law by applying it to transactions unrelated to the forum. As shown in the text, however, there is a world of difference between applying forum state law to thousands of leases involving foreign property and nonresidents and applying it to an accident covered by an insurance policy embracing risks throughout the nation issued to a member of the forum's work force.

[26] This holding was contrary to its position in prior similar cases in which the Kansas court cautioned that "[a] court should also give careful consideration . . . to any possible conflict of laws problems," *Shutts I*, 222 Kan. at 557, 567 P.2d at 1314, and attempted to analyze the law of other states. The present case aban-

mate interest in adjudicating the claims of class members." A43. Second, the "common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole . . . ." *Id.* Third, class members were given notice of the action, and by failing to opt out "plaintiff class members . . . indicated their desire to have this action determined under the laws of Kansas." *Id.*

As discussed earlier, the only "significant legitimate interest" identified by the court below is Phillips' business and property in Kansas. A26.[27] But Phillips' Kansas activities are totally unrelated to the non-Kansas leases entered into with the nonresidents. Accordingly, this supposed Kansas interest cannot translate into a contact between absent class members and the forum that justifies the application of local law to contractual transactions having absolutely no relation to Kansas. Under this rationale, each state's law could be applied to every nonresident class members' claims since Phillips holds assets or does business in every state. That result unquestionably transgresses due process because it is "arbitrary" and "fundamentally unfair." *See* Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 Hofstra L. Rev. 17 (1981).

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dons that position possibly because the court realized the difficulties in analyzing all of the various legal relationships and obligations created by the plethora of contractual arrangements existing in each of the various states in which Phillips had leases. That variousness of transaction is further evidence of the inappropriateness of taking jurisdiction over a class action on a nationwide basis and applying Kansas law.

[27] There is nothing comparable in this case to the forum's interest in *Allstate Ins. Co.* that arose because of Allstate's presence in the forum. As this Court noted, "Allstate's presence in Minnesota gave Minnesota an interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident and court-appointed representative—respondent—and a longstanding member of Minnesota's work force—Mr. Hague." 449 U.S. at 318.

Nor does the illusory "common fund" justify the application of Kansas law in this case. In the "common fund" cases, the "funds" are "common" in part because they clearly are governed by one state's law.[28] The law applied in those cases was the law of the state that had the most significant relationship to the funds. These cases simply do not provide a basis for exempting from normal choice of law rules, class actions involving contractual transactions entered into by citizens of every state with regard to oil and gas rights in thousands of parcels of land in 11 different states.

Perhaps the most abhorent reason given by the court below for applying Kansas law is its assertion that by failing to opt out, the absent class members have "indicated their desire to have the action determined under the laws of Kansas."[29] This is little more than the mindless application of a fiction in an attempt to justify an absurd result. One consequence of this outrageous holding is obvious: "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistable." *Allstate Ins. Co. v. Hague*, 449 U.S. at 337 (Powell, J., dissenting).

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[28] Several of these cases arose in the context of challenges to assessments of fraternal organizations. The controlling law was the law by which the organization was chartered. (If one law is to be applied here on this basis, it should be that of Delaware.) The necessity of one law controlling these funds stemmed from "the instrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed." *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531, 542 (1915). When the class members' rights stem from a multitude of individual contracts, the rationale for requiring one rule of law is absent.

[29] Apparently, the interest of Phillips in having its contractual rights accorded Full Faith and Credit meant little to the court below.

Thus, the court below granted plaintiffs in a class action the right to choose not only the forum in which to have their claims heard, but also the right to choose the governing law. That was done despite the fact that more than 97 percent of the class members have no contacts with Kansas and more than 99 percent do not have any interest in a Kansas oil or gas lease. The Kansas court has invited nonresident plaintiffs, such as the Andersons, to travel to Kansas to initiate nationwide class actions, and to have not only their claims, which arose outside Kansas, but all other class claims decided under Kansas law. In the past this Court has refused to condone the application of a forum's choice of law rule when it led to such an egregiously "arbitrary" and "fundamentally unfair" result.

The application of Kansas law to every member of the class is pernicious. It means that Phillips, which is incorporated in Delaware and has its principal place of business in Oklahoma, and a citizen of Texas who has leased oil and gas rights in Texas land to Phillips, will have their rights under the lease determined by Kansas law. This will occur simply because a Kansan the Texan never has met, has joined together with two Oklahomans neither has met, to bring a class action in Kansas that purports to embrace the Texan. What conceivable "legitimate" Kansas "state interests" justify this result? And, is it not obvious that the application of Kansas law comes as a complete surprise to both the Texas royalty owner and Phillips? [30]

[30] The illustration, of course, describes virtually every member of the class in this action. The result below is even more unacceptable as applied to a non-Kansas royalty owner who has a non-Kansas lease with a non-Kansas oil company other than Phillips that has sold the gas to Phillips under an agreement that obliges Phillips to pay the royalty owner. Many of the class members in this case are in exactly that situation, because, as noted in the statement of facts, see page 3 above, Phillips is both a producer and a purchaser of gas.

An example of the arbitrary and fundamentally unfair impact that the application of Kansas law had on the issue of the liability *vel non* of Phillips can be seen by an examination of certain contracts between Phillips as gas purchaser and the producers of gas as sellers. As purchaser, Phillips contracted to pay royalties as the producer "shall from time to time direct." The royalty obligation is determined by the terms of the lease agreement between the producer (not Phillips) and the royalty owner. Typically, a lease obligates the producer to pay a portion of the proceeds from the sale of the gas to the royalty owner. Under this arrangement, there is no direct contract between Phillips and the royalty owners.

Four hundred eighty-three of the gas purchase contracts between Phillips and gas producers entered into in other states address the issue of Phillips' liability for interest. R.V. II Transcript 1-27-83, pp. 49-50. These contracts explicitly preclude any liability for interest on amounts paid following government rate increases. Contract excerpt at A37. The royalty owners under these contracts have no contractual relationship with Phillips that would obligate Phillips to pay interest under Texas law. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978); *Phillips Petroleum Co. v. Adams*, 513 F.2d 355, 361-62 (5th Cir. 1975) (royalty owner has no greater rights than gas producer). The court below, however, applied Kansas law, and without identifying the source of the royalty owner's entitlement to interest, held that the right to interest could not be avoided by the contract between Phillips and the producer, relying on *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied*, 434 U.S. 1065 (1978). Not only does Texas law give no support to the extra-contractual obligation created by Kansas, but Texas also does not even follow the *Maddox* rule. *Exxon Corp. v. Middleton*, 613 S.W.2d 240 (Tex. 1981). The application of Kansas law to these gas purchase contracts, which

have nothing to do with Kansas, creates a liability that Phillips expressly and contractually sought to avoid.

The court below not only created an obligation for interest that stems from an unidentifiable source (and one that cannot be contractually avoided), but it also ensured that the obligation was at the highest possible rate. It accomplished the latter result by transmogrifying Phillips' obligation to make refunds with interest *to pipeline purchasers* with regard to gas *sold*, into an "agreement" to pay *royalty owners* interest at the FPC prescribed rates on gas *purchased* by Phillips.[31] No other state ever has hinted that the federal regulation, promulgated for an unrelated purpose, could have such far reaching applications. If the Kansas law is upheld, all natural gas producers and purchasers will have to conform every transaction in each state with these Kansas obligations. This is totally offensive in a federal system. Kansas cannot be permitted to usurp the ability of every other state to make decisions with regard to transactions that occur within their borders or to oil and gas from beneath the surface of their land.

By imposing Kansas law on all members of the class, Kansas not only has rewritten the obligations of Phillips under non-Kansas contracts, but it also has failed to give effect to substantive defenses recognized by other states,[32] overridden legislated policies found in state statutes,[33] and in one case ignored a state Constitution.[34] Kansas cavalierly has imposed its own unique notions of contract and oil and gas law on all the non-Kansas contracts involved in this action. Had Kansas applied Texas law as stated by the Texas Supreme Court in *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978), Phillips would not be liable to certain royalty owners with whom it had no direct contractual connection, and its liability to all others would be less than one-half the amount resulting from the imposition of a higher interest rate by the court below.

The Constitution prohibits the legal imperialism inherent in the decision below. "Full faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1938). *See also Hartford Accident & Indemnity Co. v. Delta*

[31] In order to circumvent the application of state statutes prescribing a legal rate of interest, the Kansas Supreme Court created a fiction that transformed Phillips' corporate undertaking filed with the FPC pursuant to 18 C.F.R. § 154.102(b) into a promise to pay royalty owners interest at the "FPC rate." Other states would not adopt this ill-founded position for four basic reasons. First, there is nothing in the federal regulation or in the orders promulgating it, that even suggests an intent to benefit third-party royalty owners when refunds are not required. Second, nothing in the corporate undertaking filed by Phillips, R.V. I, p. 202, creates an obligation to pay any money, or any interest at any rate, to royalty owners. Third, much of the gas involved in this case was not even sold subject to refund under the regulation. Fourth, Phillips was the *purchaser* of much of the gas and not the *seller*, and Phillips' corporate undertaking is totally unrelated to these purchase transactions.

[32] For example, in Texas if the interest obligation is based on an equity theory, an offer to pay additional royalties conditioned on the royalty owner entering into an indemnity agreement terminates liability for further interest. *Phillips Petroleum Co. v. Riverview Gas Compression Co.*, 409 F. Supp. 486 (N.D. Tex. 1976). Under Kansas law, an offer does not terminate liability. *Shutts I*, 222 Kan. at 566, 567 P.2d at 1320.

[33] For example, Okla. Stat. Ann. tit. 23, § 8 (1951) provides: "Accepting payment of the whole principal, as such, waives all claims to interest." Kansas avoided this statute by engrafting an exception California had recognized to a similar California statute. *Shutts I*, 222 Kan. at 568, 567 P.2d at 1292. There is no indication that Oklahoma courts would recognize this exception.

[34] The Constitution of Oklahoma prescribes an interest rate of six percent that may be applicable to cases like this one. Okla. Const. Art. XIV, § 2.

& Pine Land Co., 292 U.S. 143, 149-50 (1934). The ability of Kansas, or any state, to impress its legal doctrine on wholly foreign transactions destroys the stability of commercial transactions. The scope of class actions tremendously increases the scale upon which contract rights, settled interests, and legitimate expectations are shattered.[35] Class actions simply cannot be exempted from the limitations on choice of law rules without creating a "substantial threat to our constitutional system of cooperative federalism." *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979).

The fact that the Kansas court utilized interest rate regulations established by the federal government for entirely different purposes as a guide to the award of prejudgment interest cannot give the holding below any additional validity. Allowing a state court to formulate and apply its own "national" rule is a curious and unacceptable reverse image of the days when federal courts applied their own concepts of general law in diversity suits. Upholding the choice of law rule adopted by the court below resurrects many of the problems that existed then. Like the practice struck down in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the holding below is contrary to the Constitution

> "which recognizes and preserves the autonomy and independence of the States,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any inference with either, except as thus permitted, is an

[35] The impact on Allstate of it having to pay a claim to Mrs. Hague, should be compared to the impact on Phillips of its having to pay over 28,000 claimants under Kansas law, and the additional impact of having to conform with Kansas law in all other aspects of the relationship between Phillips and every one of its royalty payees.

> invasion of the authority of the State and, to that extent, a denial of its independence."

304 U.S. at 78-79, *quoting*, *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1892) (Field, J., dissenting).

The Kansas court's holdings on jurisdiction and conflict of laws create an intolerable situation in which Kansas can adjudicate a nationwide class action and apply Kansas law without any contacts among the dispute, the parties, and the state. Under Kansas' unique approach to choice of law, the mere institution of a class action in Kansas provides the foundation for applying Kansas law. It is impossible to imagine what type of a showing of rights guaranteed a defendant or nonresident class members by other states would convince Kansas to apply another state's substantive law.

If the integrity of the contractual relationships between Phillips and property owners in the 10 states other than Kansas are to be protected by the Due Process and Full Faith and Credit Clauses, Kansas' arbitrary approach cannot be approved and the decision below must be reversed. States must have a principled basis for applying their own law. This is particularly important because the implications of what Kansas has done go far beyond this action. Since what is good for the goose is good for the gander, other states may choose to follow the lead of Kansas with regard to nationwide class actions in a variety of substantive contexts. This problem is not limited to oil and gas lease matters, as is illustrated by the assertion of jurisdiction by Illinois over a nationwide consumer class action in *Miner v. Gillette Co.*, 87 Ill. 247, 428 N.E.2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982).

Only this Court can assure Phillips, other defendants, and nonresident class members that the rights guaranteed by the laws of the state in which a contract is entered into, or property is located, or a tort occurs, will be respected in Kansas. State courts must be prevented

from indiscriminately imposing forum law on thousands of transactions and countless nonresidents through the expedient of declaring a nationwide class action premised on nothing more than a common question of law or fact when that state has absolutely no legitimate interest at stake.

III. THE DUE PROCESS AND THE FULL FAITH AND CREDIT CLAUSES, ACTING TO PROTECT PRINCIPLES OF INTERSTATE FEDERALISM AND THE ORDERLY ADMINISTRATION OF LAWS, PROHIBIT KANSAS FROM ASSERTING JURISDICTION OVER NONRESIDENT CLASS MEMBERS AND APPLYING KANSAS LAW IN THIS CASE.

This Court always has recognized that constitutional limitations on state court jurisdiction and choice of law are designed in part to preserve the sovereignty of the several states in our federal system. For example, this Court has said that the limitation on state court jurisdiction imposed by the minimum contacts requirement "reflects an element of federalism and the character of state sovereignty vis-a-vis other states." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).[36] As stated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980):

> [*W*]*e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.* The economic interdependence of the States was foreseen and desired by the Framers. . . . But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. *The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States*—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.
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> Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S. at 319. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum state has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, *the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.*

(Emphasis added.)

And in the choice of law environment, this Court has insisted that before a state constitutionally may select its own law, "that state must have a significant contact or sufficient aggregation of contacts, creating state interests . . . ." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). The reason, according to the dissenting Justices in the same case, is that "[b]oth the Due Process and Full Faith and Credit Clauses ensure that the States do not 'reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.'" *Id.* at 337, *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292.

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[36] Although personal jurisdiction requirements generally can be viewed only as a function of individual liberties protected by the Due Process Clause, the enforceability of the resulting judgment against unnamed, nonresident class members raises distinct federalism concerns, both as they relate to the individual liberty interests, and as they arise from the Full Faith and Credit Clause.

Thus, the constitutional limitations on state court power are designed to prevent one state from reaching beyond its borders to interfere in the relationships between other states and their citizens, which is precisely what Kansas has done in this case. Respecting the right of states to exercise their "sovereign power to try causes in their courts" and to apply their own law ensures the availability of local forums for the resolution of disputes, promotes the development by each state of a body of law best adapted to serve the needs of its citizens, and puts the courts under the political control of those whom their decisions affect. The intent of the Framers regarding these fundamental principles cannot be ignored merely to further supposed interests of a particular state, special groups, or undemonstrated economies of judicial administration. As stated in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 509 (4th Cir. 1956):

> If one State may . . . extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity of the States will be reduced to a mere fiction. Individual States could undertake at the expense of other States to enlarge the sphere of their authority to nationwide dimensions. It requires no flight of fancy to foresee the resulting maze of lawsuits adjudicating the interests of persons having only the faintest and most remote links with the State exercising authority. If the due process clause is not effective to restrain such extensions of local power, then the federal system is likely to be transformed into something very different from anything we have known.

The Kansas Supreme Court erred because it failed to appreciate or even recognize the sovereignty and judicial power of the other states preserved by the Constitution. Its sole emphasis on notice and representation as the foundation of state court power and its insistence on applying Kansas law to transactions and people in which

it has absolutely no interest, renders state lines meaningless. An exercise of state court authority that takes no account whatsoever of the situs of the subject matter of the dispute, the citizenship or residence or even location of the parties, or the relationship between their conduct or the matters to be adjudicated and the forum state, cannot be squared with the principles of our federal system. It must be rejected.

What the Kansas Supreme Court has done in this case shows the grave threat posed to the federal system by unconstrained state court assertions of jurisdiction and applications of forum law in the national class action context. Given the exponential growth in cases of this type in recent years, this Court must establish effective limitations under the Due Process and Full Faith and Credit Clauses on state power. Otherwise, the deleterious side effects of national class actions will do irreparable damage to federalism.

A. The Decision Below Will Lead To Forum Shopping.

If a class action may be brought in any state and local law applied, whether or not the action has any relationship to that forum, plaintiff's counsel will choose a state likely to be receptive to his or her client's claim. "Magnet" states may develop that will resolve, on a nationwide basis, issues concerning consumer protection, products liability, environmental concerns, or the relationship between a gas producer or purchaser and royalty owners. Thus, one would expect a state like Kansas, which has exhibited a receptive and liberal attitude toward class actions on behalf of royalty owners, to be asked repeatedly to adjudicate claims made on their behalf. This already has proven to be the case. There are reported decisions in at least eight Kansas class actions similar to the present one, and its courts have entertained

others.[37] No other state has a reported decision involving a class action seeking interest on additional royalties.[38]

If the approach taken below is tolerated by this Court, other "magnet" forums for other "important issues" are likely to arise. Out of a prudent regard for their self-defense, potential targets will file declaratory judgment actions in "friendly" forums. The result will be unseemly races to courthouses or to judgment.

B. The Decision Below Will Cause The Laws Of Other States Not To Be Applied, Or To Be Improperly Applied.

The decision below demonstrates that there is a substantial likelihood that the forum state will reach results in adjudicating claims before it that conflict with those that would be obtained in far more interested states. Because the results of these class actions purport to operate on a nationwide basis, they will nullify the policies of those other states on a massive scale.

Interstate federalism strives to protect each state's inherent right to adjudge liabilities according to social and economic policies enunciated by a state's governmental branches, pursuant to procedural rules administered by a state's own administrative or judicial tribunals, and subject to penalties and forfeitures established by representative governing bodies. In creating this environment, each state presumably weighs the economic and social benefits of encouraging corporate or individual activity against the costs or disadvantages to its people. Each state thus generates policies designed to strike a balance between competing goals to achieve the best result for all its citizens. The array of policy choices made reflects the regional, economic, and social diversity present in our nation. These policy decisions ultimately are subject to approval or change by resident voters in each state. If the decision below is permitted to stand, each state, in significant areas of sovereign activity, would effectively make those value judgments on behalf of every other state, but without the system of checks and balances that now exist.

[37] Kansas has granted classes of royalty owners relief in other contexts, such as actions to recover royalties based not upon what the producer received when the gas was sold, but rather upon some current "market value" for that gas. *E.g., Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337 (1983). These holdings are contrary to those in other states.

[38] The only class actions that have been brought against Phillips outside Kansas to collect interest on additional royalties were brought in Oklahoma and both were dismissed. The first was brought by Bill Ginder, the senior partner of Ed Moore, one of the plaintiff's counsel. That case was dismissed. The second was immediately brought by Robert and Betty Anderson, respondents herein, also in Oklahoma. They dismissed that lawsuit when they joined Irl Shutts as plaintiffs in the present case.

There simply is no reason to believe that states will decide questions of law affecting the claims of nonresident members in the same way as would the courts of states having a meaningful relationship with those class members.[39] As this case graphically illustrates, many courts, which already have wide latitude in choosing the governing law under *Allstate Ins. Co.*, undoubtedly will arrogate to themselves infinitely more authority to do so and probably will not even attempt to apply the law of other interested states. Therefore, adherence to the minimum contacts limitations on state court jurisdiction in the class action context is essential to provide a barrier against the type of parochial applications of forum law that occurred in this case. A42-A43.

[39] The inherent incentive to forum shop suggests that disinterested states might well be chosen by class representatives in some instances because they would not follow the view of a more interested state.

Even if the forum state attempts to divide a class and apply the state law appropriate to each subclass, it is unrealistic to expect those laws to be determined correctly.[40] A court cannot easily perceive the subtle nuances of the law and policies of another state. For example, only Kansas and Texas have reported cases requiring interest on additional royalties. Whether other states even recognize a claim for interest is uncertain.[41] As this Court has recognized, the determination of unsettled state law is a very difficult task. *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 715-16 (1973); *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499 (1941). This especially is true when the subject of the inquiry is highly local in character, such as property or oil and gas law. State courts may well be unwilling to struggle with deciding an uncertain issue on the basis of another state's laws and either will tend to impose their own conception of "good" policy or merely assume that other states follow the forum's policies. A state court hearing a nationwide class action in all likelihood will apply local rules of evidence, statutes of limitations, or other procedural law that, in themselves, could frustrate policies of other states.[42]

[40] In *Shutts I*, for example, the Kansas Supreme Court construed Texas law as allowing recovery of rates of interest determined by federal regulation. 222 Kan. at 563-64, 567 P.2d at 1318-19. This construction of Texas law subsequently proved incorrect when the Texas Supreme Court limited interest to the Texas statutory rate. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978).

[41] In *Boutte v. Chevron Oil Co.*, 316 F. Supp. 524 (E.D. La. 1970), *aff'd per curiam*, 442 F.2d 1337 (5th Cir. 1971), the court, in dictum, suggested that there might be an allowance of interest on suspended royalties. This dictum appears to conflict with other Louisiana cases concerning interest. *See Frankel v. Bellamore*, 176 La. 1001, 147 So. 59, 60 (1933).

[42] The Court in *Keeton v. Hustler Magazine, Inc.*, —— U.S. ——, 104 S. Ct. 1473 (1984), noted the "considerable academic criticism of the rule that permits a forum state to apply its own statute of limitations regardless of the significance of contacts between the forum state and the litigation." The Court, however, did not determine "whether any arguable unfairness rises to the level of a due process violation." 104 S. Ct. at 1480 n.10.

Admittedly, state courts always have been assumed competent to apply the law of another state when adjudicating transitory causes of action. But the contemporary national class action obliges state courts to undertake the task on an unprecedented scale, casting serious doubt on their willingness and capacity to do it, unless this Court imposes meaningful constitutional limitations on applying forum law.

The decision below demonstrates how easily the policies of numerous states can be ignored, even as to transactions occurring within those states, by a forum entertaining a nationwide class action. For example, Kansas has undertaken to decide the property rights of over 9,500 Texas citizens, most likely with regard to oil and gas produced in Texas. The Kansas Supreme Court did not even consult Texas law. Even if it had, there simply is no assurance that the Texas policies would be honored. Interstate federalism's attempt to protect each state's ability to formulate and enforce its own policies clearly is frustrated by the decision below. Encroachments on state sovereignity must be minimized by limiting jurisdiction in class actions to forums that have legitimate "contracts, ties, or relations" with the events giving rise to the claims and the parties to the actions.

C. The Decision Below Will Lead To Jurisdictional Conflicts Among The States.

The broad and unprecedented assertion of jurisdiction and application of forum law by the Kansas court also interferes with the administration of justice in the courts of every other state by substantially increasing the pos-

sibility of conflicts among those courts.[43] Eliminating any jurisdictional limitations on state court class actions will mean that all 50 states simultaneously can entertain class actions on behalf of the same nationwide class. It is inevitable that in many instances the same action will be brought in more than one state, encouraging races to the courthouse by the lawyers who specialize in these actions. If every state is permitted to entertain nationwide class actions and apply its own law, there will be no efficient mechanism for resolving the resulting conflicts. This Court must apply the Constitution in a way that will prevent these unseemly collisions.

D. There Is No Justification For Permitting The Interference With The Orderly Administration Of Laws That Results From The Decision Below.

Intrusions on the judicial power of one state by another might be tolerable when necessary to protect an important forum state interest. That is not the case, however, in the present situation in which a state court seeks to adjudicate, under its own law, the claims of nonresidents that arose beyond the boundaries of the forum, and in which the forum state possesses absolutely no interest. The court below claimed that judicial economy will result from its entertaining this class action. It tried to buttress its conclusion by mischaracterizing Phillips' minimum contacts argument as advocating a requirement of individual actions or multiple class actions in all 50 states. Phillips is not arguing that class actions be restricted to residents of the forum state. Class actions may include nonresident class members who have minimum contacts with the forum so that it is fair to litigate their claims in that state. The Kansas court erroneously

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[43] For example, conflicting nationwide, diversity-based class actions involving products liability are pending. *See Jones v. Medtronic, Inc.*, Case No. CV-84-L-24555 (N.D. Ala.), and *Linkous v. Medtronic, Inc.*, Case No. 84-1909 (E.D. Pa.).

has assumed that the alternative to this single nationwide class action in Kansas is a class action in each state. The correct alternative is one or more class actions in the state or states that have a constitutionally sufficient relationship with all or a significant number of class members.

In the present case, Oklahoma appears to be such a proper forum to bind all plaintiffs, since each class member had contact with that state and all additional royalties were disbursed from that state. These contacts with Oklahoma, coupled with the interest Oklahoma has in regulating a company with its principal place of business in Bartlesville, might well make it fair to litigate all claims in Oklahoma. The judicial efficiency sought by the court below is not lost if the entire case is litigated in an interested forum.

Kansas' assertion of jurisdiction and application of its own law to adjudicate claims relating to thousands of transactions and nonresidents, with which it has absolutely no relation, was accomplished at the expense of the policies and sovereignty of every other state in the Union. The decision below provides ample proof that invoking cliches about the efficiency and representational character of the class action will produce results that are antithetical to our federal system. Unless this Court insists that its announced jurisdiction principles are adhered to and meaningful choice of law limitations are imposed, state courts inevitably will run riot with the national class action and balkanize numerous areas of substantive law. Our federalism encourages the states to be laboratories to "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That design will be totally thwarted if states can use the national class action procedure to extend their jurisdictional reach and apply their

own law to impose their "experiments" on every other state. The need to oppose principles of restraint is obvious.

CONCLUSION

For the reasons stated, the judgment of the Kansas Supreme Court should be reversed. The case should be remanded with directions to dismiss the claims of nonresident class members.

Respectfully submitted,

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